Imposition of Adult Sentences in Designated Cases

Chapter 20

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Part I — Introduction

20.1 Court Rules Governing Sentencing Hearings in Designated Cases

If the court determines that the juvenile should be sentenced as an adult, either initially or following delayed imposition of sentence, the sentencing hearing must be held in accordance with MCR 6.425. MCR 5.955(C).

The other provisions of Subchapter 6.400 apply to designated proceedings as well, MCR 5.954, and the procedures in MCR 6.610(F) apply to sentencing for misdemeanor offenses in district court.

20.2 Judges Who Must Preside at Sentencing Hearings

MCR 5.912(A)(1)(d) requires a judge to preside at a sentencing in a designated case. The juvenile has the right to demand that the same judge who accepted the plea or presided at the trial of a designated case preside at sentencing or delayed imposition of sentence, but not at a juvenile disposition of the designated case. MCR 5.912(A)(3).

20.3 Right to Counsel at Sentencing Hearings

Sentencing is a critical stage in a criminal proceeding; thus, a defendant is entitled to the assistance of counsel. *Mempa v Rhay*, 389 US 128; 88 S Ct 254; 19 L Ed 2d 336 (1967), and *People v Dickerson*, 17 Mich App 201, 204 (1969). Waiver of the right to counsel for trial purposes does not extend to sentencing. *People v Wakeford*, 418 Mich 95, 121 (1983).*

*See Section 16.6 (right to counsel in designated proceedings).

Part II — Presentence Information and Sentencing Guidelines

20.4 Required Contents of Presentence Reports

MCR 6.425(A) requires the probation officer, prior to sentencing, to investigate the defendant's background and character, verify material information, and report in writing the results of the investigation to the court. The report must be succinct and, depending on the circumstances, include:

(1) a description of the defendant's prior criminal convictions and juvenile adjudications;*

*See Section 20.23 (resolving challenges to presentence report).

(2) a complete description of the offense and the circumstances surrounding it;*

*See Section 20.10 (proportionality).

(3) a brief description of the defendant's vocational background and work history, including military record and present employment status;

(4) a brief social history of the defendant, including marital status, financial status, length of residence in the community, educational background, and other pertinent data;

(5) the defendant's medical history, substance abuse history, if any, and, if indicated, a current psychological or psychiatric report;*

*See Section 20.5 (use of psychiatric report).

*See Section 20.33–20.34 (orders for restitution).

(6) information concerning the financial, social, psychological, or physical harm suffered by any victim of the offense, including the restitution needs of the victim;*

*See Section 20.6.

(7) if provided and requested by the victim, a written victim's impact statement as provided by law;*

(8) any statement the defendant wishes to make;

*See Section 20.8.

(9) a statement prepared by the prosecutor on the applicability of any consecutive sentencing provision;*

(10) an evaluation of and prognosis for the defendant's adjustment in the community based on factual information in the report;

*See Section 20.7 (required sentence recommendation).

(11) a specific recommendation for disposition;* and

(12) any other information that may aid the court in sentencing.

MCR 6.425(A)(1)–(12).

The presentence report is an integral part of the sentencing process, designed to facilitate informed, individualized sentences appropriate to the offender and offense. *People v Lee*, 391 Mich 618, 635 (1974). Where the presentence report clearly does not comply with the statutory requirements of MCL 771.14; MSA 28.1144 (which contains requirements similar to MCR 6.425), resentencing is necessary even if the defendant failed to object at sentencing. *People v Green*, 123 Mich App 563, 569 (1983).

A presentence report is required before sentencing a person charged with a felony, and is discretionary for persons charged with a misdemeanor. MCL 771.14(1); MSA 28.1144(1). Public policy does not permit the waiver of a presentence report before imposition of an indeterminate sentence in a felony case. *People v Brown*, 393 Mich 174, 179–81 (1974).

The presentence report may include information not admissible at trial. *People v Fleming*, 428 Mich 408, 418 (1987).

Regardless of the sentence imposed, the court must have a copy of the presentence report and of any psychiatric report sent to the Department of Corrections. If the defendant is sentenced to prison, the copies must be sent with the commitment papers. MCR 6.425(A).

20.5 Use of Psychiatric Reports at Sentencing

*See Section 20.24, below, for a discussion of this duty.

A psychiatric exam designed to evaluate the defendant's character traits for sentencing purposes is implicitly authorized by MCL 771.14(7); MSA 28.1144(7), and MCR 6.425(A)(5), and is consistent with the duty to individualize sentences.* A judge has discretion in all cases to obtain such a report. *People v Wright*, 431 Mich 282, 287 (1988).

The Fifth Amendment right against self-incrimination attaches at a defendant's court-ordered psychiatric examination; however, warnings need not be as explicit as required by *Miranda*. A defendant need only be told of the potential use of any statements at sentencing and asked if he is willing to proceed. *Wright*, *supra,* at 295.

A defendant's Sixth Amendment right to counsel is abridged where defendant is not given an opportunity to consult with counsel prior to participating in a court-ordered examination. *Wright*, *supra*, at 296, quoting *Estelle v Smith*, 451 US 454, 470, n 14; 101 S Ct 1866; 68 L Ed 2d 359 (1981). See also *People v Murphy*, 146 Mich App 724, 727–28 (1985) (waiver of Fifth and Sixth Amendment rights at a court-ordered exam).

A criminal responsibility report prepared for an insanity defense at the request of defense counsel pursuant to MCL 768.20a; MSA 28.1043(1), may be considered at sentencing. *People v Potrafka*, 140 Mich App 749, 753 (1985).*

*See Section 16.35(B) (notice of insanity defense).

20.6 Victim Impact Statements in Presentence Reports

The victim has a right to submit or make a written or oral impact statement to the probation officer for use by that officer in preparing a presentence investigation report concerning the defendant. If the victim requests, a copy of his or her written impact statement must be included in the presentence investigation report. MCL 780.764; MSA 28.1287(764).*

*See also Section 20.19, below, for a discussion of oral impact statements at sentencing hearings.

NOTE: The Juvenile Crime Victim's Rights Act, MCL 780.781–780.802; MSA 28.1287(781)–28.1287(802), applies to juveniles alleged or found to be within the Family Division's jurisdiction under MCL 712A.2(a)(1); MSA 27.3178(598.2)(a)(1), for certain criminal offenses, including felonies.* However, it appears that if the court decides to sentence the juvenile as an adult following conviction in designated proceedings, the provisions of the [Adult] Crime Victim's Rights Act, MCL 780.751–780.775; MSA 28.1287(751)–28.1287(775), dealing with written impact statements apply. See the 1989 Staff Comment following MCR 6.425, which states that "[t]he content of the victim's impact statement described in subrule (A)(7) is set forth in MCL 780.763; MSA 28.1287(763)."

*See Section 18.21 for a discussion of the applicability of the JCVRA to other proceedings in designated cases.

The victim's impact statement may include, but shall not be limited to, the following:

(a) an explanation of the nature and extent of any physical, psychological, or emotional harm or trauma suffered by the victim;

(b) an explanation of the extent of any economic loss or property damage suffered by the victim;

(c) an opinion of the need for, and extent of, restitution, and whether the victim has applied for or received compensation for loss or damage;* and

(d) the victim's recommendation for an appropriate disposition.

*See Sections 20.33–20.34, below, for a discussion of restitution.

MCL 780.763(3)(a)–(d); MSA 28.1287(763)(3)(a)–(d).

20.7 Required Sentence Recommendation in Presentence Reports

The presentence report must contain a specific written recommendation for disposition. See MCR 6.425(A)(11) and *People v Strunk*, 172 Mich App 208, 210–11 (1988). An alternative recommendation (jail time or probation) is insufficient. *People v Green*, 123 Mich App 563, 568 (1983). However, a recommendation of "incarceration" is sufficiently specific. *People v Sterling*, 154 Mich App 223, 234 (1986). So is a recommendation of "a very lengthy prison term." *People v Thornsbury*, 148 Mich App 92, 98 (1985).

20.8 Prosecutor's Statement of Applicable Consecutive Sentencing Provisions in Presentence Reports

Consecutive sentencing may not be imposed unless specifically authorized by statute. *People v Sawyer*, 410 Mich 531, 534 (1981). The prosecuting attorney is required to include in the presentence report a statement on the applicability of any consecutive sentencing provisions. MCR 6.425(A)(9).

Among the statutory provisions mandating consecutive sentences are:

- when a person escapes from prison or jail while serving a sentence or awaiting disposition on a felony or misdemeanor charge, MCL 750.193, 750.195 and 750.197; MSA 28.390, 28.392 and 28.394;
- when a person commits a major controlled substance offense while another felony charge is pending, MCL 768.7b(2)(b); MSA 28.1030(2)(2)(b);
- for felony-firearm, MCL 750.227b; MSA 28.424(2) (sentence must run consecutively to underlying felony);
- for any offense committed while defendant is on parole, or while defendant is incarcerated in a penal or reformatory institution, or while

defendant has escaped from such an institution, MCL 768.7a; MSA 28.1030(1); and

- for a major controlled substances offense, where a term of imprisonment is imposed for commission of another felony, MCL 333.7401(3); MSA 14.15(7401)(3).*

*See Section 19.9 for a list of major controlled substance offenses.

MCL 333.7401(3); MSA 14.15(7401)(3), applies whenever a defendant is sentenced on any of the major controlled substance offenses at the same time as or after any other felony offense, whether a drug offense or a non-drug offense. *People v Morris*, 450 Mich 316, 337–38 (1995). In addition, the trial court has authority to impose consecutive sentences for conspiracy to commit one of the major controlled substance offenses, even though the sentences are not imposed pursuant to the Controlled Substances Act but pursuant to the conspiracy statute, MCL 750.157a; MSA 28.354(1). *People v Denio*, 454 Mich 691, 698–705 (1997).

Consecutive sentences may be imposed:*

*First-degree home invasion (if juvenile is armed with a dangerous weapon) and carjacking are specified juvenile violations, for which the juvenile may be sentenced to prison. See Section 19.6.

- when a person commits a felony while another felony charge is pending, MCL 768.7b(2)(a); MSA 28.1030(2)(2)(a) (unless the subsequent offense is a major controlled substance offense, MCL 768.7b(2)(b); MSA 28.1030(2)(2)(b));
- for first-degree home invasion, MCL 750.110a; MSA 28.305(a) (sentence may be consecutive to sentence imposed for any other criminal offense arising from the same transaction);
- for carjacking, MCL 750.529a; MSA 28.797(a) (sentence may run consecutively to any other sentence imposed for a conviction that arises out of the same transaction); and
- for taking a weapon or firearm from a peace or corrections officer, MCL 750.479b; MSA 28.747(2) (sentence may run consecutively to any term of imprisonment imposed for another violation arising from the same transaction).

NOTE: See Monograph 9, *Sentencing*, Section 2.17 (MJI, 1994), and *Managing a Trial Under the Controlled Substances Act*, Section 15.2(C) (MJI, 1995), for a more detailed discussion of consecutive sentencing.

20.9 Required Use of the Sentencing Guidelines

The court must use the applicable sentencing guidelines when imposing sentence for an offense that is included in the guidelines. Not later than the date of sentencing, the court must complete a sentencing information report on a form to be prescribed by and returned to the state court administrator. MCR 6.425(D)(1). For instructions on completing the Sentencing Information Report, see Michigan Sentencing Guidelines (2d ed, 1988), pp 1–10.

*See Section 20.13 for required procedures for departure from guidelines.

Whenever the court determines that a minimum sentence outside the recommended minimum range should be imposed, the judge must explain on the sentencing information report and on the record the aspects of the case that have persuaded the judge to impose a sentence outside the recommended minimum range. MCR 6.425(D)(1).*

NOTE: MCL 769.32; MSA 28.1097(3.2), mandates the creation of a sentencing commission in the legislative council, with a directive to research and develop legislative sentencing guidelines. MCL 769.33; MSA 28.1097(3.3). Until legislative sentencing guidelines are enacted, the Supreme Court Guidelines remain in effect by specific direction of the Legislature. See AO 1988-4, 430 Mich ci (1988), and Michigan Sentencing Guidelines (2d ed, 1988).

*See also Section 20.13, below, for a discussion of departure from the guidelines.

*See Section 20.20, below, for a discussion of the possible effect of the defendant's age on the proportionality of the sentence.

20.10 Sentencing Guidelines and the Principle of Proportionality*

Penal statutes punish more harmful conduct by offenders with more serious prior records more harshly than less aggravated conduct by less threatening offenders. Judicial sentencing discretion should be exercised within the legislatively prescribed range according to the same principle of proportionality that guides the legislature in its allocation of punishment over the full spectrum of criminal behavior. *People v Milbourn*, 435 Mich 630, 651 (1990). A given sentence must be "proportionate to the seriousness of the circumstances surrounding the offense and the offender." *Milbourn, supra,* at 635. See *People v Crook*, 162 Mich App 106, 108–09 (1987) (comparison of sentences for two factually similar offenses committed by juveniles).*

The sentencing guidelines represent the actual sentencing practices of the judiciary, and the second edition of the sentencing guidelines is the best "barometer" for determining whether the trial court has violated the principle of proportionality and thus abused its sentencing discretion. *Milbourn, supra,* at 656. However, the sentencing guidelines do not have the force of law. *Id.,* at 656–57, and *People v Raby,* 456 Mich 487, 496 (1998), quoting with approval *People v Mitchell*, 454 Mich 145, 175 (1997).

The following categories of offenses are covered by the sentencing guidelines:

- **F** assault;
- **F** burglary;
- **F** criminal sexual conduct;
- **F** drug offenses;
- **F** fraud;
- **F** homicide;
- **F** larceny;
- **F** property destruction;

- **F** robbery; and
- **F** weapons possession.

Michigan Sentencing Guidelines (2d ed, 1988), pp 2–3.

A separate category for aiding and abetting is unnecessary because there is no distinction between principals and accessories in Michigan law; the guidelines are therefore applicable in the case of a guidelines offense where the defendant is convicted on an aiding and abetting theory. *People v Spicer,* 216 Mich App 270, 273–75 (1996). However, the guidelines may not be extended by analogy to offenses to which they are not applicable by their terms. *People v Laube,* 155 Mich App 415, 417 (1986).

If consecutive sentences are involved, each sentence should be judged individually. If each sentence is within the applicable guidelines range, then each sentence is presumptively proportionate. *People v Warner,* 190 Mich App 734, 736 (1991).

20.11 Required Use of the Sentencing Information Report

A Sentencing Information Report (SIR) must be prepared in every case. Failure to prepare a SIR in a case where the guidelines are applicable is error requiring resentencing. *People v Romano,* 181 Mich App 204, 221–22 (1989). Where a defendant is being sentenced for multiple offenses, a SIR need only be prepared for the conviction carrying the highest statutory maximum. *People v Hodges,* 179 Mich App 629, 636 (1989), and Michigan Sentencing Guidelines (2d ed, 1988), p 1. This does not apply, however, to consecutive sentencing situations: the guidelines must be scored for each offense. *People v Hill,* 221 Mich App 391, 396 (1997). Where the defendant is being sentenced for two offenses carrying the same statutory maximum, the court may use guidelines for either offense. *People v Dowdy,* 148 Mich App 517, 523 (1986), and Michigan Sentencing Guidelines (2d ed, 1988), p 1.

20.12 Scoring the Sentencing Information Report

It is the responsibility of the probation officer, as part of his or her duty to make a sentence recommendation, to accurately score the SIR, and it is the responsibility of the court to ensure the scoring is accurate. *People v Pilbeam,* 160 Mich App 497, 498 (1987), *People v Strunk,* 172 Mich App 208, 210 (1988), and Michigan Sentencing Guidelines (2d ed, 1988), p 1.

The guidelines are to be scored in accordance with the proven or acknowledged facts, even where those facts are inconsistent with the offense of which a defendant is actually convicted. *People v Wiggins,* 151 Mich App 622, 626–27 (1986), and Michigan Sentencing Guidelines (2d ed, 1988), p 5. But see Michigan Sentencing Guidelines (2d ed, 1988), p 77 (in homicide cases, when scoring Offense Variable 3, intent to kill or injure, "the sentencing judge must score this variable consistent with a jury verdict

unless the judge has information that was not presented to the jury"), and *People v LeMarbe (After Remand)*, 201 Mich App 45, 48–49 (1993).

Appellate review of the scoring of sentencing guidelines is limited to whether "(1) a factual predicate is wholly unsupported, (2) a factual predicate is materially false, and (3) the sentence is disproportionate." *People v Raby*, 456 Mich 487, 497–98 (1998), quoting *People v Mitchell*, 454 Mich 145, 177 (1997). As a result, the Court of Appeals will now review the scoring of sentencing guidelines only if defendant's challenge is directed to the accuracy of the factual basis for his or her sentence, and will not review the judge's scoring of a guideline variable that is based on the judge's interpretation of unchallenged facts. *Id.*

Moreover, to raise on appeal an issue challenging the accuracy of the presentence report or the scoring of the sentencing guidelines, the party must raise the issue at or before sentencing, or must demonstrate that the challenge was brought as soon as the inaccuracy could reasonably have been discovered. Any other challenge may be brought only by motion for relief from judgment under Subchapter 6.500. MCR 6.429(C).

20.13 Required Procedures to Depart From the Guidelines Minimum Recommended Sentence Range

*See also Section 20.20, below (required articulation of reasons for sentence imposed).

The sentencing judge may depart from the recommended minimum range for the reasons, and in the manner, prescribed by the guidelines. AO 1984-1, 418 Mich lxxx (1984). When a court departs, it must explain on the record* and Sentencing Information Report the aspects of the case that have persuaded the court to impose a sentence outside the recommended minimum range. Michigan Sentencing Guidelines (2d ed, 1988), p 7.

Departures from the guidelines' recommendation are appropriate where the guidelines do not adequately account for important factors that should be considered. *People v Milbourn*, 435 Mich 630, 657 (1990). Departures are "suspect and subject to careful scrutiny on appeal." *People v Stone*, 195 Mich App 600, 608 (1992) (juvenile armed robbery defendant). Although a trial judge may state reasons for departure based on factors already considered in the guidelines, the judge's right to depart in this fashion should be exercised with caution. *People v Milbourn*, 435 Mich 630, 659–60, 660, n 27 (1990).

However, the mere fact that the sentence imposed exceeded the guidelines does not necessarily make it disproportionate. *People v Merriweather*, 447 Mich 799, 807–08 (1994), and *People v Houston*, 448 Mich 312, 320–21 (1995). A sentencing court is free to depart from the guidelines' recommended range when it is disproportionate to the circumstances of the offense and the offender, *Merriweather, supra*, or where "the offense involved circumstances not accounted for, or accounted for inadequately, in formulating the guidelines," *Houston, supra*, at 321.

Milbourn did not address the situation where a defendant pleads guilty in exchange for dismissal of other charges or to a lesser offense. Such pleas present the sentencing judge with important factors that may not be embodied in the sentencing guidelines variables. *People v Duprey*, 186 Mich App 313, 318 (1990).*

*See Section 17.6 for a more detailed discussion of such plea agreements.

20.14 Required Disclosure of Presentence Report Before the Sentencing Hearing

The court must permit the prosecutor, the defendant's lawyer, and the defendant to review the presentence report at a reasonable time before the day of sentencing. MCR 6.425(B). The presentence report need not be disclosed to defendant within a specific number of days before sentencing, and a wide variety of practices among courts exists. *People v Hernandez*, 443 Mich 1, 13 (1993) (disclosure of report nine days before sentencing is commended by Michigan Supreme Court). Nonetheless, defense counsel has a right to see the presentence report before sentencing to assure that the defendant's sentence is based on accurate information. *People v McFarlin*, 389 Mich 557, 575 (1973).

The court may exempt from disclosure information or diagnostic opinion that might seriously disrupt a program of rehabilitation and sources of information that have been obtained on a promise of confidentiality. When part of the report is not disclosed, the court must inform the parties that information has not been disclosed and state on the record the reasons for nondisclosure. To the extent that it can do so without defeating the purpose of nondisclosure, the court must also provide the parties with a written or oral summary of the nondisclosed information and give them an opportunity to comment on it. The court must have the information exempted from disclosure specifically noted in the report. The court's decision to exempt part of the report from disclosure is subject to appellate review. MCR 6.425(B).

Part III — Sentencing Hearings

20.15 Time Requirements for Sentencing Hearings

MCR 6.425(D)(2) requires the court to sentence the defendant within a reasonably prompt time after the plea or verdict unless the court delays sentencing as provided by law.*

*Note that the court in designated cases must initially decide whether to order a juvenile disposition or adult sentence. See Section 19.1.

20.16 Required Procedures at Sentencing Hearings

At sentencing, the court complying on the record, must:

*See Section 20.14 (required disclosure of presentence report before sentencing).

(a) determine that the defendant, the defendant's lawyer, and the prosecutor have had an opportunity to read and discuss the presentence report;*

*See Section 20.21 (resolving challenges to presentence report).

(b) give each party the opportunity to explain, or challenge the accuracy or relevancy of, any information in the presentence report, and resolve any challenges in accordance with the procedure set forth in MCR 6.425(D)(3);*

*See Sections 20.18 and 20.19 (defendant's and victim's rights of allocution).

(c) give the defendant, the defendant's lawyer, the prosecutor, and the victim an opportunity to advise the court of any circumstances they believe the court should consider in imposing sentence;*

*See Sections 20.25 (establishing minimum and maximum sentences) and 20.26 (credit for time served).

(d) state the sentence being imposed, including the minimum and maximum sentence if applicable, together with any credit for time served to which the defendant is entitled;*

*See Section 20.20.

(e) articulate its reasons for imposing the sentence given;* and

*See Sections 20.33 – 20.34.

(f) if a victim of the crime has suffered harm and the court does not order restitution as provided by law or orders only partial restitution, state the reasons for its action.*

MCR 6.425(D)(2)(a)–(f).

20.17 Rules of Evidence Are Inapplicable at Sentencing Hearings

The rules of evidence, other than those with respect to privileges, do not apply at sentencing hearings. MRE 1101(b)(3).

20.18 Defendant's Right of Allocution at Sentencing Hearings

Both the defendant and defense counsel must be given the opportunity to make a statement to the sentencing judge prior to the imposition of sentence. *People v Berry*, 409 Mich 774, 779 (1980). Denial of the right, either to counsel or to defendant, requires resentencing. *People v Theobald*, 117 Mich App 216, 219 (1982), and *People v Jones (On Rehearing)*, 201 Mich App 449, 453 (1993). However, where resentencing is a mechanical correction of a previous error, the right of allocution need not be afforded. *People v Foy*, 124 Mich App 107, 112 (1983).

20.19 Victim's Right to Make an Oral Impact Statement at Sentencing Hearings

MCL 780.765; MSA 28.1287(765), of the Crime Victim's Rights Act, states that the victim of a felony shall have the right to appear and make an oral impact statement at the sentencing of the defendant.

NOTE: The Juvenile Crime Victim's Rights Act, MCL 780.781–780.802; MSA 28.1287(781)–28.1287(802), applies to juveniles alleged or found to be within the Family Division's jurisdiction under MCL 712A.2(a)(1); MSA 27.3178(598.2)(a)(1), for certain criminal offenses, including felonies. However, it appears that if the court decides to sentence the juvenile as an adult following conviction in designated proceedings, the provisions of the [Adult] Crime Victim's Rights Act, MCL 780.751–780.775; MSA 28.1287(751)–28.1287(775), dealing with oral impact statements apply. See the 1989 Staff Comment following MCR 6.425, which provides that the court rule provisions regarding oral impact statements are based on the requirements in the [Adult] Crime Victim's Rights Act.

20.20 Required Articulation of Reasons for the Sentence Imposed

The sentencing judge has a duty to articulate on the record reasons for the sentence imposed, even where the sentence falls within the appropriate guidelines range.* *People v Coles,* 417 Mich 523, 549–50 (1983), *In re Jenkins,* 438 Mich 364, 375–76 (1991), and *People v Triplett,* 432 Mich 568, 570–73 (1989). However, where a sentence within the guidelines range is imposed, a statement by the sentencing court that it is sentencing the defendant pursuant to the guidelines satisfies the articulation requirement. *People v Bailey (On Remand),* 218 Mich App 645, 646–47 (1996). See also *People v Poppa,* 193 Mich App 184, 189–91 (1992) (articulation of presumptive minimum sentence for drug offense satisfies requirement).

*See Section 20.10, above (sentencing guidelines and the principle of proportionality).

Factors to be considered in determining an appropriate sentence include reformation of the offender, protection of society, disciplining of the wrongdoer, and deterrence of others from committing like offenses. *People v Snow,* 386 Mich 586, 592 (1972), citing *Williams v New York,* 337 US 241; 69 S Ct 1079; 93 L Ed 1337 (1949).

A sentencing court may, in some circumstances, consider a defendant's age when formulating a proportionate sentence, but it need not do so. *People v Piotrowski,* 211 Mich App 527, 532–33 (1995) (17-year-old defendant sentenced for armed robbery and UDAA was not entitled to a lesser sentence because of her age). However, in *People v McKernan,* 185 Mich App 780, 782 (1990), the Court of Appeals reversed and remanded for resentencing because the judge concluded that the defendant's age (64) increased the probability of recidivism. In doing so, the Court of Appeals

discussed the types of information that the trial court should have before considering the defendant's age as a factor in defendant's sentence:

> "The trial judge has simply concluded that an older person is more likely to be a repeat offender than a younger person. Before a sentencing judge can make such a conclusion, some scientific or psychological justification should be made part of the record and the defendant must be afforded the opportunity to challenge the court's belief at the sentencing hearing."

Id., at 782–83. See also *People v Fleming*, 428 Mich 408, 423–24, n 17 (1987) ("Any predictions of a defendant's future behavior based on a status characteristic such as race, religion, gender, or age are suspect").

20.21 Required Procedures for Resolving Challenges to the Presentence Report

Each party must be given an opportunity to explain or challenge the accuracy or relevancy of any information in the presentence report. MCR 6.425(D)(2)(b), and *People v Ewing (After Remand)*, 435 Mich 443, 449–51 (1990).

If any information in the presentence report is challenged, the court must make a finding with respect to the challenge or determine that a finding is unnecessary because it will not take the challenged information into account in sentencing. MCR 6.425(D)(3). If the court finds merit in the challenge or determines that it will not take the challenged information into account in sentencing, it must direct the probation officer to:

(a) correct or delete the challenged information in the report, whichever is appropriate, and

(b) provide defendant's lawyer with an opportunity to review the corrected report before it is sent to the Department of Corrections.

MCR 6.425(D)(3)(a)–(b).

A defendant is entitled to be sentenced on the basis of accurate information. *Townsend v Burke*, 334 US 736, 740–41; 68 S Ct 1252; 92 L Ed 2d 1690 (1948), and *People v Malkowski*, 385 Mich 244, 249 (1971). The sentencing judge must respond to claims of inaccuracy, and failure to do so requires resentencing. *People v Harrison*, 119 Mich App 491, 494–99 (1982). Defendant is entitled to have information stricken from the presentence report where the sentencing court stated it would disregard the information challenged as inaccurate. *People v Britt*, 202 Mich App 714, 718 (1993), *People v Harris*, 190 Mich App 652, 662 (1991), and *People v Martinez (After Remand)*, 210 Mich App 199, 202–03 (1995).

When issues of fact are controverted, the sentencing court must apply a "preponderance of the evidence" standard in resolving the controversy. The defendant bears the burden of going forward with "an effective challenge." If the record contains evidence supporting or disproving a factual assertion in the guidelines or presentence report, the court may, in its discretion, take further proofs. *People v Walker,* 428 Mich 261, 267–68 (1987).

A trial court must resolve a properly raised challenge to the scoring of guidelines variables in the same fashion as it resolves any other dispute over the accuracy of information to be considered at sentencing. *People v Boucher,* 165 Mich App 361, 363 (1987).

A party may not raise on appeal an issue challenging the accuracy of the presentence report or the scoring of the sentencing guidelines unless the party has raised the issue at or before sentencing or demonstrates that the challenge was brought as soon as the inaccuracy could reasonably have been discovered. Any other challenge may be brought only by motion for relief from judgment under Subchapter 6.500. MCR 6.429(C). But see *People v Mitchell,* 454 Mich 145, 177 (1997), and *People v Raby,* 456 Mich 487, 497–98 (1998) (application of guidelines states cognizable claim to relief on appeal only where factual predicate is wholly unsupported or materially false, or where the resulting sentence is disproportionate).

20.22 Required Procedures When the Court Considers Criminal Conduct Not Resulting in Conviction

Uncharged criminal activity not reflected in the scoring of the sentencing guidelines may be considered. *People v Edgley,* 187 Mich App 211, 212–13 (1991).* However, the sentencing judge may not conclude that the defendant is guilty of a greater offense when no record evidence supports that conclusion. *People v Tyler,* 188 Mich App 83, 87 (1991).

*See Section 20.12, above (scoring the sentencing information report).

Although criminal conduct not resulting in conviction may be included in a presentence report, when an objection is raised:

- the sentencing judge has a duty to ascertain that the defendant is not prejudiced by false information in the report, *People v McIntosh,* 62 Mich App 422, 439–46 (1975), modified on other grounds 400 Mich 1 (1977); and
- the court may hold an evidentiary hearing, accept defendant's version of the facts, or ignore the information altogether. *People v Robinson,* 147 Mich App 509, 511–12 (1985).

A sentencing judge may also consider criminal conduct of which defendant has been acquitted, as long as defendant has an opportunity to challenge the accuracy of the allegations and the judge finds their accuracy supported by a preponderance of the evidence. *People v Ewing (After Remand),* 435 Mich 443, 451–53, 462–63 (1990). Incidents that occurred while the defendant was a juvenile but that did not result in adjudication may also be considered. *People v Cross,* 186 Mich App 216, 217–18 (1990).

20.23 Required Procedures When the Court Considers Prior Convictions and Juvenile Adjudications

The sentencing court must not consider prior convictions or juvenile adjudications if the convictions or adjudications were obtained without counsel or a valid waiver thereof. *United States v Tucker,* 404 US 443, 445–46; 92 S Ct 589; 30 L Ed 2d 592 (1972), *People v Moore,* 391 Mich 426, 436–38 (1974), and *People v Hannan (After Remand),* 200 Mich App 123, 128–30 (1993) (court may not use counselless convictions to score sentencing guidelines). But see *People v Daoust,* ___ Mich App ___ (1998) (sentencing court may consider uncounselled prior juvenile adjudications if no "incarceration" resulted). The court may consider a defendant's juvenile record that has been set aside. *People v Smith,* 437 Mich 293, 302–04 (1991).

MCR 5.925(F) states that when the juvenile offense record of an adult convicted of a crime is made available to the appropriate agency, as provided in MCL 791.228(1); MSA 28.2298(1), the record must state whether, as to each adjudication, the juvenile had counsel or voluntarily waived counsel. *People v McFarlin,* 389 Mich 557, 575 (1973).

To challenge the validity of prior convictions or adjudications, the defendant must:

- present prima facie proof that a previous conviction was violative of *Gideon v Wainwright,* 372 US 335; 83 S Ct 792; 9 L Ed 2d 799 (1963), such as a docket entry showing the absence of counsel or a transcript evidencing the same, or
- present evidence that he has requested these records from the sentencing court and it has failed to reply or refused to furnish copies of the records within a reasonable time (four weeks).

Upon such a showing, the burden shifts to the prosecutor to establish the constitutional validity of the prior conviction or to show affirmative record evidence of waiver. Unless the prosecutor shows such evidence within one month of the defendant's motion, the matter must be set for a hearing. *People v Moore,* 391 Mich 426, 440–41 (1974), and *People v Carpentier,* 446 Mich 19, 24 (1994) (reply from the trial court to a request for records that a juvenile record has been expunged does not constitute either a failure or refusal to apply).

Part IV — Fashioning the Sentence

20.24 Court's Duty to Individualize the Sentence

"The modern view of sentencing is that the sentence should be tailored to the particular circumstances of the case and the offender[*] in an effort to balance both society's need for protection and its interest in maximizing the offender's rehabilitative potential. While the resources allocated for rehabilitation may be inadequate and some persons question whether rehabilitation can be achieved in the prison setting, this view of sentencing is the present policy of the state. A judge needs complete information to set a proper individualized sentence." *People v McFarlin,* 389 Mich 557, 574 (1973).

*See also Section 20.10, above, for a discussion of the sentencing guidelines and the principle of proportionality.

To tailor the sentence, the judge must gather complete and detailed information about the defendant, assess the reliability of the information received, assure that it is reasonably up-to-date, determine its competency as a sentencing consideration, and resolve challenges to its accuracy. *People v Pulley,* 411 Mich 523, 529–30 (1981).

When imposing sentence upon a defendant, the trial court is not required to consider the sentence imposed on a co-defendant. *In re Jenkins,* 438 Mich 364, 376 (1991).

20.25 Establishing the Minimums and Maximums for Prison Sentences*

*See Section 19.6 for a list of the statutory maximum sentences for specified juvenile violations.

An indeterminate sentence, for which the judge fixes the lengths of both the minimum and maximum portions of the sentence, is required for most prison sentences. See MCL 769.8–769.11; MSA 28.1080–28.1083. In most cases, the maximum sentence is determined by the statute under which the defendant was convicted, and the court fixes only the minimum term to be served by the defendant. MCL 769.8; MSA 28.1080. However, there are several exceptions to this rule, including the following:

- Where the statutory penalty is denoted as "life imprisonment or any term of years," both the minimum and maximum sentences are discretionary with the court. MCL 769.9(2); MSA 28.1081(2). But see *People v Austin,* 191 Mich App 468, 469 (1991), and *People v Blythe,* 417 Mich 430, 436–37 (1983) (court must sentence defendant to term of imprisonment instead of jail term).
- A sentence of a term of years to a maximum of life imprisonment is invalid under the indeterminate sentencing statute, MCL 769.9; MSA 28.1081. *People v Boswell,* 95 Mich App 405, 410 (1980), and *People v Foy,* 124 Mich App 107, 113 (1983).
- For felony firearm, MCL 750.227b; MSA 28.424(2), a mandatory "flat" prison term is required.
- For a major controlled substance offense, the maximum need not be the maximum set by the Legislature. See MCL 769.9(3); MSA 28.1081(3),

People v Perez, 417 Mich 1100.21 (1983), and *People v LW Smith*, 437 Mich 1047 (1991). The Supreme Court in *Perez, supra,* held in a summary disposition that "the statutory minimum and maximum sentences for major controlled substance offenses are not mandatory except insofar as they establish the outer limits within which a sentence must be fixed."

Any prison sentence that provides for a minimum term exceeding two-thirds of the statutory maximum term is improper, as it fails to comply with the Indeterminate Sentence Act, MCL 769.8 and 769.9; MSA 28.1080 and 28.1081. This rule does not apply to sentences imposed under statutes with punishment prescribed as life imprisonment or those providing for a "flat" prison term. *People v Tanner,* 387 Mich 683, 690 (1972).

Statutes and case law mandating minimum terms of imprisonment include:*

*The offenses in bold type are specified juvenile violations, for which juveniles may be committed to the Department of Corrections. See Section 19.6. See also Section 20.28, Note, for a discussion of mandatory minimum terms for non-specified juvenile violations.

- **first-degree murder**, MCL 750.316; MSA 28.548, life imprisonment without parole (but see *People v Jahner,* 433 Mich 490 (1989), life sentence for conspiracy to commit first-degree murder subject to parole under the "lifer law," MCL 791.234(4); MSA 28.2304(4));
- placing explosives with intent to destroy causing personal injury, MCL 750.207; MSA 28.404, life imprisonment without parole;
- **armed robbery during which there was an aggravated assault or serious injury**, MCL 750.529; MSA 28.797, no less than 2 years;
- **armed robbery, second-degree murder, and first-degree criminal sexual conduct**, *imprisonment* for at least 1 day to 1 year and a day (see *People v Austin,* 191 Mich App 468, 469–70 (1991) and *People v Blythe,* 417 Mich 430, 436–37 (1983) (interpreting the phrase "life imprisonment or any term of years"));
- felony-firearm, MCL 750.227b; MSA 28.424(2), 2 years;
- felony-firearm, second offense, 5 years;
- felony-firearm, third offense, 10 years;
- second or subsequent offense of **first-degree**, second-degree, or third-degree criminal sexual conduct, MCL 750.520f; MSA 28.788(6), no less than 5 years;
- **delivery or possession of 650 grams or more of a Schedule 1 or 2 narcotic drug or cocaine,** MCL 333.7401(2)(a)(i)(B) and 333.7403(2)(a)(i)(B); MSA 14.15(7401)(2)(a)(i)(B) and 14.15(7403)(2)(a)(i)(B), not less than 25 years for juveniles charged in designated proceedings;* and
- second offense of delivery or possession of more than 50 grams of a Schedule 1 or 2 narcotic drug or cocaine, or conspiracy to commit those offenses, MCL 333.7413(1); MSA 14.15(7413)(1), life imprisonment without parole.

*See Section 19.9(A) for a more detailed discussion of this statute.

20.26 Required Credit for Time Spent in Custody Prior to Sentencing

MCR 6.425(D)(2) requires that the sentencing court grant credit for time served to which the defendant is entitled. The following statutes and court rules mandate such credits in designated proceedings:

- If sentencing is not delayed, the juvenile is entitled to credit for "time served" before sentencing, MCL 712A.18(1)(n); MSA 27.3178(598.18)(1)(n).
- If sentencing is delayed, the juvenile is entitled to credit "for the period of time served on probation" before sentencing, MCL 712A.18i(11); MSA 27.3178(598.18i)(11). See also MCR 5.956(A)(5) and 5.956(B)(4), both of which also mandate credit "for the time served on probation" when sentencing is delayed in a designated proceeding.*

*See Sections 21.11 an 21.15, above, for a more detailed discussion of these provisions.

In addition, there are several other statutory provisions that mandate credit for time served for all criminal defendants:

- time spent in jail due to inability to post bond, MCL 769.11b; MSA 28.1083(2);
- time spent in a juvenile facility prior to sentencing because of being denied or unable to furnish bond, MCL 764.27a(5); MSA 28.886(1)(5);
- time spent in custody during competency evaluations and treatment, MCL 330.2042; MSA 14.800(1042); and
- time spent in jail or prison on a void sentence that is set aside must be credited against a new sentence imposed for a conviction "based upon facts arising out of the earlier void conviction," MCL 769.11a; MSA 28.1083(1).

Sentence credit under MCL 769.11b; MSA 28.1083(2), must be limited to jail time served for the offense of which the defendant is convicted. A defendant is not entitled to credit for time served on unrelated charges committed while out on bond. *People v Prieskorn,* 424 Mich 327, 340 (1985). Nor does the statute entitle a defendant to credit for time served on unrelated offenses in other jurisdictions between conviction and sentencing on a Michigan offense, whether or not Michigan authorities have placed, or could have placed, a detainer or "hold" on the jailed defendant. *People v Adkins,* 433 Mich 732, 734 (1989). See, however, *Adkins, supra,* at 751, n 10 (opinion "must not be seen as in any way *prohibiting* a sentencing judge from granting sentence credit for time served for an unrelated offense should it be decided such credit is warranted. The trial court's sentencing discretion under our indeterminate sentencing law, MCL 769.1; MSA 28.1072, clearly would permit reducing a defendant's minimum sentence should the court think such action appropriate.").

A defendant is entitled to credit for time served against the first of two consecutive sentences. *People v Cantu,* 117 Mich App 399, 402–03 (1982).

NOTE: For a more detailed discussion of credit for time served, see Robertson, Felony Sentencing in Michigan, Michigan Appellate Assigned Counsel System, pp 100–07 (1992).

20.27 Requirements to Incarcerate Juveniles in County Jail

*See Form JC 71.

MCL 712A.18(15); MSA 27.3178(598.18)(15), states that the court shall not impose a sentence of imprisonment* in the county jail under MCL 712A.18(1)(n); MSA 27.3178(598.18)(1)(n), unless the present county jail facility for the imprisonment of the juvenile would meet all requirements under federal law and regulations for housing juveniles, and the court shall not impose the sentence until it consults with the sheriff to determine when the sentence will begin to ensure that space will be available for the juvenile.

20.28 Offenses for Which Juveniles May Be Sentenced to Prison*

*See Section 19.6 for a list of offenses for which juveniles may be committed to the Department of Corrections and their maximum penalties. See also MCL 791.220g; MSA 28.2290(7), which provides for youth correctional facilities within the Department of Corrections.

A juvenile sentenced to imprisonment under MCL 712A.18(1)(n); MSA 27.3178(598.18)(1)(n), shall not be committed to the jurisdiction of the Department of Corrections unless the juvenile was convicted of a specified juvenile violation. MCL 712A.18h; MSA 27.3178(598.18h). A juvenile may also be sentenced to prison for a lesser-included offense of a specified juvenile violation arising out of the same transaction, or for any other offense arising out of the same transaction, if the juvenile was charged with a specified juvenile violation.

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NOTE: MCL 712A.18h; MSA 27.3178(598.18h), states that juveniles "sentenced to imprisonment under section 18(1)(n) of this chapter shall not be committed to the jurisdiction of the department of corrections." This limitation does not apply to juveniles convicted of specified juvenile violations. *Id.* Because MCL 712A.18(1)(n); MSA 27.3178(598.18)(1)(n), deals with the initial decision to impose or delay imposition of sentence, it is unclear whether juveniles may be committed to the Department of Corrections during the delay in imposition of sentence. See Section 19.1.

When imposition of an adult sentence has been delayed, the court may impose sentence at any time during the delay under MCL 712A.18i; MSA 27.3178(598.18i), and section (11) of that statute contemplates a sentence of imprisonment. Thus, it appears that commitment to the Department of Corrections is a sentencing option in court-designated cases during the period that the court has jurisdiction over the juvenile. See also Section 21.12, Note 1, for a discussion of limitations on sentencing juveniles following probation violations requiring probation revocation, where the juveniles were originally convicted of non-specified juvenile violations.

In addition, the penalty provisions of those non-specified juvenile violations that require imprisonment are in conflict with MCL 712A.18h; MSA 27.3178(598.18h). It is a general rule of statutory construction that if two statutes appear to be in conflict the specific statute prevails as an exception to the general one. *People v Tucker,* 177 Mich App 174, 179 (1989), citing *Wayne Co Prosecutor v Wayne Circuit Judge,* 154 Mich App 216, 221 (1986). It appears, therefore, that a Family Division judge sentencing a juvenile as an adult for a non-specified juvenile violation is not bound by a penal statute mandating a term of imprisonment.

20.29 Requirements for Probation Supervision

If the court, following conviction in a designated case, imposes a sentence of probation in the same manner as probation could be imposed upon an adult convicted of the same offense for which the juvenile was convicted or enters an order of disposition delaying imposition of sentence and placing the juvenile on probation, the probation supervision and related services shall not be performed by employees of the Department of Corrections. MCL 712A.9a; MSA 27.3178(598.9a). In such cases, probation supervision and related services will be performed by Family Division probation officers.

20.30 Case Law Examples of Prison Sentences Imposed on Juveniles

The following cases may provide some guidance in fashioning a proper sentence for a juvenile convicted and sentenced as an adult following designated proceedings. Although the cases all involve juveniles sentenced following "automatic" waiver of juvenile court jurisdiction, the same law

will govern adult sentences imposed on juveniles following designated proceedings.

A. Murder

- **F** *People v Launsburry,* 217 Mich App 358, 363–65 (1996) (mandatory life sentence without parole imposed on juvenile convicted of first-degree murder does not constitute cruel or unusual punishment).
- **F** *People v Buck,* 197 Mich App 404, 431 (1992), rev'd on other grounds sub nom *People v Holcomb,* 444 Mich 853 (1993) (22–40 years for second-degree murder is proportionate; case involves multiple defendants).
- **F** *People v Perkins,* unpublished opinion per curiam of the Court of Appeals, decided November 21, 1995 (Docket No. 160177) (15–25 years for second-degree murder, although within guidelines range of 4–15 years, violates principle of proportionality; sentence of less than maximum recommended by guidelines should have been imposed).
- **F** *People v Cline,* unpublished opinion per curiam of the Court of Appeals, decided April 16, 1996 (Docket No. 176717) (40–60 years for second-degree murder and assault with intent to commit murder is disproportionate; although court did not improperly consider defendant's age and mental retardation, defendant's sentence did not reflect the seriousness of the circumstances surrounding the offense and offender).

B. Assault With Intent to Murder

- **F** *People v Jones,* unpublished opinion per curiam of the Court of Appeals, decided September 17, 1996 (Docket No. 172564) (20–30 years for assault with intent to commit murder is proportionate; juvenile's age is an important factor in determining an appropriate sentence).
- **F** *People v Adkins,* unpublished opinion per curiam of the Court of Appeals, decided April 8, 1997 (Docket Nos. 172976 and 181162) (25–50 years for assault with intent to murder and other offenses is proportionate; juvenile is a 16-year-old offender with no previous juvenile placement).

C. Armed Robbery

- **F** *People v Stone,* 195 Mich App 600, 607–09 (1992) (7 1/2–15 years for armed robbery is disproportionate).
- **F** *People v Mui,* unpublished opinion per curiam of the Court of Appeals, decided September 25, 1991 (Docket No. 127280) (18–45 years for armed robbery; remanded for reconsideration in light of *People v Milbourn,* 435 Mich 630 (1990), which was not released until approximately one year after defendant was sentenced in this case).
- **F** *People v Banks,* unpublished opinion per curiam of the Court of Appeals, decided March 7, 1997 (Docket No. 185855) (6–20 years for

armed robbery is proportionate but 12–30 years for conspiracy to commit armed robbery is disproportionate; conspiracy conviction was already factored into guidelines calculation for armed robbery, and negative circumstances of defendant's background and instant offense were considered in sentence imposed for armed robbery).

D. Criminal Sexual Conduct

- *People v Mooney*, unpublished opinion per curiam of the Court of Appeals, decided April 21, 1993 (Docket No. 135326) (63–94 1/2 years for first-degree criminal sexual conduct is disproportionate, where the upper end of guidelines range was 30 years).
- *People v Smith,* unpublished opinion of the Court of Appeals, decided December 9, 1994 (Docket No. 164924) (10–15 years for second-degree criminal sexual conduct is proportionate where guidelines called for minimum sentencing range of 3–7 years; defendant pleaded guilty in exchange for dismissal of greater charges).
- *People v Parrish,* 216 Mich App 178, 184–85 (1996) (7–15 years for third-degree criminal sexual conduct is proportionate; guidelines recommended 3–6 years).

Part V — Financial Penalties

20.31 Imposition of Court Costs

A. Costs As Part of a Sentence to Prison or Jail

Costs may not be imposed as part of a defendant's prison sentence unless the costs are expressly authorized by a procedural statute or court rule, or by the penal statute under which defendant was convicted. *People v Michael Jones,* 182 Mich App 125, 126–28 (1989). See also *People v Krieger,* 202 Mich App 245, 247 (1993), where the Court of Appeals held that a sentence of prison plus costs was improper even though the sentence came after defendant had violated probation, and costs had properly been part of his probationary sentence.

NOTE: Most of Michigan's penal statutes do not authorize payment of costs. Instead, they usually require penalties of incarceration and/or a fine. Therefore, the authority to order costs usually must come from a procedural statute or court rule.

In addition, there is no statutory provision authorizing costs as part of a straight jail term. See *People v Watts,* 133 Mich App 80, 84 (1984), where the Court of Appeals reversed a sentence of 8 months in jail plus costs for attorney fees, witness fees, and jury fees.

*See Form JC 74.

B. Costs As a Condition of Probation*

If the defendant is placed on probation, the sentencing court may order defendant to pay costs as a condition of probation. MCL 771.3(2)(c); MSA 28.1133(2)(c). If the court requires defendant to pay costs, the costs shall be limited to expenses specifically incurred in prosecuting the defendant, providing legal assistance to the defendant, and providing probation supervision of the defendant. MCL 771.3(4); MSA 28.1133(4).

*See Sections 19.10 (requirements for delayed imposition of sentence) and 12.14 (reimbursement of costs when juvenile is placed outside home).

If the court imposes a sentence of probation in the same manner as probation could be imposed upon an adult or enters an order of disposition delaying imposition of sentence and placing the juvenile on probation, the probation supervision and related services shall not be performed by employees of the Department of Corrections. MCL 712A.9a; MSA 27.3178(598.9a). Thus, in such cases, a probation supervision fee would not be paid to the Department of Corrections pursuant to MCL 771.3c; MSA 28.1133(3), but to the Family Division pursuant to MCL 712A.18; MSA 27.3178(598.18).*

C. Hearing Requirements for Orders of Costs

The sentencing court is not required to hold a hearing to determine defendant's ability to pay before ordering defendant to pay costs as part of defendant's sentence. The Supreme Court in *People v Music*, 428 Mich 356, 361–62 (1987), held that the sentencing judge is not required to hold a hearing at sentencing unless the defendant requests such a hearing. Otherwise, a hearing shall be held only at such time that defendant fails to make the required payments. Furthermore, a defendant who does not timely challenge the amount of costs waives his or her right on appeal to challenge an order for costs that appears on its face to be a reasonable approximation of costs permitted by MCL 771.3(4); MSA 28.1133(4). *Id.*, at 363.

However, if defendant does request such a hearing, the following provisions apply:

> (a) The court shall not require a probationer to pay costs unless the probationer is or will be able to pay them during the term of probation. In determining the amount and method of payment of costs, the court shall take into account the financial resources of the probationer and the nature of the burden that payment of costs will impose, with due regard to his or her other obligations.
>
> (b) A probationer who is required to pay costs and who is not in willful default of the payment of the costs, at any time, may petition the sentencing judge or his or her successor for a remission of the payment of any unpaid portion of those costs. If the court determines that payment of the amount due will impose a manifest hardship on the probationer or his or her immediate family, the court may remit all or part of the amount due in costs or modify the method of payment.

MCL 771.3(5)(a)–(b); MSA 28.1133(5)(a)–(b).

D. Use of Bond or Bail Money to Pay Costs

MCR 6.106(I)(3) and MCL 765.15(2); MSA 28.902(2), permit the application of bail money after conviction against costs, fines, restitution, and other assessments, but only bail money which has been posted by the defendant. See also MCL 765.6c; MSA 28.886(3), which states that when defendant personally pays his or her own bond, he or she shall be notified that this money may be used to pay fines, costs, restitution, or other payments ordered by the court.

E. Case Law Examples of Improper Orders for Costs

The general rule is that court costs must bear a reasonable relationship to actual expenses incurred in the defendant's case. See *People v Blachura,* 81 Mich App 399, 403–04 (1978). The costs must be assessed to reimburse the court for expenditures reasonably and properly made in defendant's case, rather than to punish defendant for his offense. *People v Teasdale,* 335 Mich 1, 8 (1952). Some examples of improper orders for costs are as follows:

- An order for defendant to pay costs for the reimbursement of medical expenses while defendant was in jail awaiting trial was improper because the medical expenses were not specifically incurred in prosecuting the defendant or providing legal assistance to the defendant. *People v Kramer,* 137 Mich App 324, 325–26 (1984). See also *People v Krieger,* 202 Mich App 245, 248–49 (1993), where the Court of Appeals held that an order for such costs was not permitted even though defendant agreed to pay them as a condition of probation.
- The costs must bear a reasonable relationship to the expenses actually incurred in defendant's case. Therefore, it was improper to assess a flat fee of $1000.00 in costs for each count of a five-count information. *People v Blachura,* 81 Mich App 399, 403–04 (1978).
- The court may not charge defendant a per diem cost for impaneling a jury because defendant has a constitutional right to a trial by jury. *People v Hope,* 297 Mich 115, 118–19 (1941).
- The court, as a condition of probation, may not require defendant to pay room and board costs for the time defendant spent in jail because these are not costs related to the prosecution or defense of defendant's case. *People v Gonyo,* 173 Mich App 716, 717–19 (1988).

NOTE: The court in *Gonyo* observed that the Legislature has provided under the Prisoner Reimbursement to the County Act, MCL 801.81 et seq.; MSA 28.1770(1) et seq., a method for a county to seek reimbursement for expenses for maintaining a prisoner. *Id.,* at 719.

F The trial court erred in assessing costs against 12 defendants in a gambling conspiracy case for such items as the rental value for one year of the premises occupied by the police department vice squad, portions of the salaries of the assistant prosecutor and police officers who worked on the case, and portions of the costs incurred for a grand jury investigation. These costs were not properly charged to defendants because they would not properly be regarded as a part of the expense to which the public had been put for apprehending and prosecuting the defendants and for providing probationary services. *People v Teasdale*, 335 Mich 1, 7 (1952).

F. Post-Sentencing Orders Regarding Costs

The sentencing judge may revoke defendant's probation because of defendant's failure to pay costs only if the judge finds that defendant has not made a good-faith effort to comply with the order for costs. In determining this, the judge shall consider defendant's employment status, earning ability, financial resources, the willfulness of defendant's failure to pay, and any other special circumstances that may have a bearing on defendant's ability to pay. MCL 771.3(7); MSA 28.1133(7).

The sentencing judge may also reduce the amount of costs owed by defendant if the defendant is not in willful default. The court may reduce the amount due for costs, or may modify the method of payment. Before doing so, the court must determine that payment of the amount due will cause an undue hardship on defendant and/or his or her immediate family. MCL 771.3(5)(b); MSA 28.1133(5)(b).

20.32 Reimbursement of Attorney Fees

*See Section 16.6 for a discussion of the right to counsel in designated proceedings.

The court may appoint counsel to represent the juvenile in designated proceedings pursuant to MCR 5.915(A)(2).* See MCR 5.951(A)(1)(c)(iii)(a) (prosecutor-designated cases) and 5.951(B)(1)(c)(iii)(a) (court-designated cases). When an attorney is appointed for a party under MCR 5.915, the court may assess the costs of the representation against the party or against the person responsible for the support of that party. An order assessing the costs of representation may be enforced through contempt proceedings. MCR 5.915(D).

NOTE: See also *People v Nowicki*, 213 Mich App 383, 385–88 (1995), where the Court of Appeals held that an order for reimbursement of fees for a court-appointed attorney was not a part of the judgment of sentence and thus did not represent "costs," which may only be imposed pursuant to statutory authority. The Court of Appeals found that a trial court has the independent authority to order a defendant to defray the public cost of representation. Orders for reimbursement of the costs of court-appointed counsel should be entered after conviction. *People v Washburn*, 66 Mich App 622, 624 (1976). In contrast, in "automatic" waiver cases, the court may order the juvenile, those responsible for the juvenile's support, or both, to reimburse the court for the costs of court-appointed counsel when the court enters a judgment of sentence or commits the juvenile to the Family Independence Agency. MCL 769.1(8); MSA 28.1072(8), and MCR 6.905(D) and 6.931(F)(1).

20.33 Orders for Restitution

Restitution is authorized under MCL 769.1a; MSA 28.1072(1), of the Code of Criminal Procedure, and MCL 780.766; MSA 28.1287(766), of the Crime Victim's Rights Act. See also MCL 771.3; MSA 28.1133 (restitution as a condition of adult probation).

NOTE: The Juvenile Crime Victim's Rights Act, MCL 780.781 et seq.; MSA 28.1287(781) et seq., applies to juveniles alleged or found to be within the Family Division's jurisdiction under MCL 712A.2(a)(1); MSA 27.3178(598.2)(a)(1), for certain criminal offenses, including felonies.* However, it appears that if the court decides to sentence the juvenile as an adult following conviction in a designated proceeding, the restitution provisions of the [Adult] Crime Victim's Rights Act, MCL 780.751 et seq.; MSA 28.1287(751) et seq., apply. See the 1989 Staff Comment following MCR 6.425, which provides that the restitution requirements of Subrule (D)(2)(f) are based on the requirements of the [Adult] Crime Victim's Rights Act.

*See Section 18.21 for a discussion of the applicability of the JCVRA to other proceedings in designated cases.

A. Persons Entitled to Restitution

Restitution is mandatory for any victim of the course of conduct that gave rise to defendant's conviction. MCL 780.766(2); MSA 28.1287(766)(2). The term "any victim" should be broadly construed to include all persons or organizations who suffered a financial loss as a result of "the course of conduct" that gave rise to defendant's conviction. *People v Gahan*, 456 Mich 264, 271–72 (1997).

Victim is defined as an individual, sole proprietorship, partnership, corporation, association, governmental entity, or any other legal entity that suffers direct or threatened physical or financial harm as a result of a felony, misdemeanor, or ordinance violation. MCL 780.766(1); MSA 28.1287(766)(1), and MCL 769.1a(1); MSA 28.1073(1).

If the victim is deceased, the court shall order restitution to the victim's estate. MCL 780.766(7); MSA 28.1287(766)(7), and MCL 769.1a(7); MSA 28.1073(7).

B. Amount of Restitution Required

MCL 780.766(2); MSA 28.1287(766)(2), and MCL 769.1a(2); MSA 28.1073(2), state that when sentencing a defendant convicted of a felony, misdemeanor, or ordinance violation, the court shall order, in addition to or in lieu of any other penalty authorized or required by law, that the defendant make full restitution to any victim of the defendant's course of conduct that gives rise to the conviction or to the victim's estate.

In *People v Gahan,* 456 Mich 264 (1997), the trial court ordered defendant to pay a total of $25,000.00 in restitution. Defendant was ordered to compensate more than 10 different victims whom he had defrauded in a similar fashion, even though he was only convicted of two counts of embezzlement. The Supreme Court unanimously affirmed, holding that the phrase "any victim of the defendant's course of conduct" should be given the broad meaning that was intended by the Legislature. The Court concluded that "the defendant should compensate for all the losses attributable to the illegal scheme that culminated in his conviction, even though some of the losses were not the factual foundation of the charge that resulted in conviction." *Id.,* at 272.

C. Time Requirements for Making Restitution

If not otherwise provided by the court, restitution shall be made immediately. However, the court may require that the defendant make restitution within a specified period or in specified installments. MCL 780.766(10); MSA 28.1287(766)(10), and MCL 769.1a(10); MSA 28.1073(10).

A defendant shall not be imprisoned, jailed, or incarcerated for a violation of probation or parole, or otherwise, for failure to pay restitution as ordered unless the court or parole board determines that the defendant has the resources to pay the ordered restitution and has not made a good faith effort to do so. MCL 780.766(14); MSA 28.1287(766)(14), and MCL 769.1a(14); MSA 28.1073(14).

D. Restitution Where Offense Results in Property Destruction

If a felony, misdemeanor, or ordinance violation results in damage to or loss or destruction of property of a victim, or results in the seizure or impoundment of property of a victim, the order of restitution may require that the defendant do one or more of the following:

(a) return the property to the owner of the property or to a person designated by the owner; or

(b) if return of all of the property is impossible, impractical, or inadequate, pay an amount equal to the greater of subdivision (i) or (ii), less the value of any portion of the property that was returned:

(i) the value of the property on the date of the damage, loss, or destruction, or

(ii) the value of the property on the date of sentencing; and

(c) pay the costs of the seizure or impoundment, or both.

MCL 780.766(3)(a)–(c); MSA 28.1287(766)(3)(a)–(c), and MCL 769.1a(3)(a)–(c); MSA 28.1073(3)(a)–(c).

E. Restitution Where Offense Results in Physical or Psychological Injury

If a felony, misdemeanor, or ordinance violation results in physical or psychological injury to a victim, the order of restitution may require that the defendant do one or more of the following, as applicable:

(a) pay an amount equal to the cost of actual medical and related professional services and devices relating to physical and psychological care;

(b) pay an amount equal to the cost of actual physical and occupational therapy and rehabilitation;

(c) reimburse the victim or the victim's estate for after-tax income loss suffered by the victim as a result of the felony, misdemeanor, or ordinance violation;

(d) pay an amount equal to the cost of psychological and medical treatment for members of the victim's family that has been incurred as a result of the felony, misdemeanor, or ordinance violation; or

(e) pay an amount equal to the costs of actual homemaking and child care expenses incurred as a result of the felony, misdemeanor, or ordinance violation.

MCL 780.766(4)(a)–(e); MSA 28.1287(766)(4)(a)–(e), and MCL 769.1a(4)(a)–(e); MSA 28.1073(4)(a)–(e).

MCL 780.766(5); MSA 28.1287(766)(5), and MCL 769.1a(5); MSA 28.1073(5), state that if a felony, misdemeanor, or ordinance violation resulting in bodily injury also results in the death of a victim, the order of restitution may require that the defendant pay an amount equal to the cost of actual funeral and related services.

If the victim is deceased, the court shall order that the restitution be made to the victim's estate. MCL 780.766(7); MSA 28.1287(766)(7), and MCL 769.1a(7); MSA 28.1073(7).

F. Orders for Services by Defendant in Lieu of Money

If the victim or the victim's estate consents, the order of restitution may require that the defendant make restitution in services in lieu of money. MCL 780.766(6); MSA 28.1287(766)(6), and MCL 769.1a(6); MSA 28.1073(6).

G. Orders for Restitution to Individuals or Organizations That Provide Money or Services to Victims

MCL 780.766(8); MSA 28.1287(766)(8), and MCL 769.1a(8); MSA 28.1073(8), state that the court shall order restitution to the crime victims compensation board or to any individuals, partnerships, corporations, associations, governmental entities, or other legal entities that have compensated the victim or the victim's estate for a loss incurred by the victim to the extent of the compensation paid for that loss. The court shall also order restitution for the costs of services provided to persons or entities that have provided services to the victim as a result of the felony, misdemeanor, or ordinance violation. Services that are subject to restitution under this subsection include, but are not limited to, shelter, food, clothing, and transportation.

However, an order of restitution shall require that all restitution to a victim or victim's estate be made before any restitution to any other person or entity under that order. The court shall not order restitution to be paid to a victim or a victim's estate if the victim or victim's estate has received or is to receive compensation for that loss, and the court shall state on the record with specificity the reasons for its actions. If an entity entitled to restitution under this subsection for compensating the victim or the victim's estate cannot or refuses to be reimbursed for that compensation, the restitution paid for that entity shall be deposited in the crime victim's rights assessment fund or its successor fund. MCL 780.766(8); MSA 28.1287(766)(8), and MCL 769.1a(8); MSA 28.1073(8).

H. Required Reports by Probation Officers

In determining the amount of restitution to order, the court shall consider the amount of loss sustained by any victim as a result of the offense. The court may order the probation officer to obtain information pertaining to the amounts of loss. The probation officer shall include this information in the presentence investigation report or in a separate report, as the court directs. The court shall disclose to both the defendant and the prosecuting attorney all portions of the presentence or other report pertaining to the amount of loss. MCL 780.767(1)–(3); MSA 28.1287(767)(1)–(3).

I. Hearing Requirements and Burden of Proof

MCL 780.767(4); MSA 28.1287(767)(4), states that any dispute as to the proper amount or type of restitution shall be resolved by the court by a preponderance of the evidence. The burden of demonstrating the amount of the loss sustained by a victim as a result of the offense shall be on the prosecuting attorney.

If the defendant disputes the amount of restitution ordered, he or she must raise a proper objection and request an evidentiary hearing. The court is not required to order sua sponte an evidentiary hearing to determine the proper amount of restitution that is due. *People v Grant*, 455 Mich 221, 243 (1997). The trial judge is entitled to rely on the information in the presentence report, which is presumed to be accurate unless the defendant effectively challenges that information. *Id.*, at 233–34. If an evidentiary hearing is held, the rules of evidence do not apply. MRE 1101(b)(3).

NOTE: The 1996 amendment to MCL 780.767(1); MSA 28.1287(767)(1), eliminated the requirement that the trial court must consider the financial resources, financial needs, and earning ability of the defendant when deciding the amount of restitution. Effective June 1, 1997, the trial court should only consider the amount of loss sustained by any victim as a result of defendant's offense.

J. Liability of Conspirators for Losses Arising Out of the Conspiracy

In *People v Grant*, 455 Mich 221 (1997), defendant pleaded guilty to conspiracy to utter and publish and was ordered to pay $175,000.00 in restitution. Defendant appealed, arguing that he played a limited role in the conspiracy and should not be liable for the entire $175,000.00. The Supreme Court disagreed and held that each conspirator is criminally responsible for the acts of his co-conspirators committed in furtherance of the conspiracy. *Id.*, at 236.

K. Modification of Restitution Orders After Sentencing

MCL 780.766(12); MSA 28.1287(766)(12), and MCL 769.1a(12); MSA 28.1073(12), state that a defendant who is required to pay restitution and who is not in willful default of the payment of the restitution may at any time petition the court to modify the method of payment. If the court determines that payment under the order will impose a manifest hardship on the defendant or his or her immediate family, the court may modify the method of payment.

NOTE: The 1996 amendments to the restitution statutes made a significant change to the modification provisions. Prior to the 1996 amendments, the trial court was permitted to cancel unpaid portions of restitution orders if the court found that payment of such orders would cause a manifest hardship on defendant or his or her immediate family. The current statutes only permit the trial court to modify the method of payments, but not the amount of the payments.

L. Enforcement and Collection of Restitution Orders

An order of restitution entered under this section remains effective until it is satisfied in full. An order of restitution is a judgment and lien against all property of the individual ordered to pay restitution for the amount specified in the order of restitution. The lien may be recorded as provided by law. An order of restitution may be enforced by the prosecuting attorney, a victim, a victim's estate, or any other person or entity named in the order to receive the restitution in the same manner as a judgment in a civil action or a lien. MCL 780.766(13); MSA 28.1287(766)(13), and MCL 769.1a(13); MSA 28.1073(13).

M. Required Set Offs for Amounts Later Recovered by Victim

MCL 780.766(9); MSA 28.1287(766)(9), and MCL 769.1a(9); MSA 28.1073(9), state that any amount paid to a victim or a victim's estate under an order of restitution shall be set off against any amount later recovered as compensatory damages by the victim or the victim's estate in any federal or state civil proceeding and shall reduce the amount payable to a victim or a victim's estate by an award from the Crime Victims Compensation Board made after an order of restitution under this section.

N. Use of Bail Money to Pay Restitution

If the defendant has personally paid his or her bond or bail, the court shall order when the bond or bail is discharged, that the money shall be used to pay restitution, costs, fines, probation supervision fees, and other assessments or court-ordered payments. MCL 765.15(2); MSA 28.902(2). See also MCL 765.6c; MSA 28.886(3), which states that when defendant personally pays his or her own bond, he or she shall be notified that the money may be used to pay fines, costs, restitution, or other payments ordered by the court.

20.34 Restitution Ordered As a Condition of Probation or Parole

MCL 780.766(11); MSA 28.1287(766)(11), and MCL 769.1a(11); MSA 28.1073(11), state that if the defendant is placed on probation or paroled,

any restitution ordered under this section shall be a condition of that probation or parole.

A. Biannual and Final Review of Restitution As Condition of Probation

MCL 780.766(15); MSA 28.1287(766)(15), and MCL 769.1a(15); MSA 28.1073(15), provide that in each case in which payment of restitution is ordered as a condition of probation, the probation officer assigned to the case shall review the case not less than twice yearly to ensure that restitution is being paid as ordered. The final review shall be conducted not less than 60 days before the expiration of the probationary period.

If the probation officer determines that the restitution is not being paid as ordered, the probation officer shall file a written report of the violation with the court on a form prescribed by the State Court Administrative Office.* The report shall include a statement of the amount of the arrearage and any reasons for the arrearage that are known by the probation officer. The probation officer shall immediately provide a copy of the report to the prosecuting attorney. If a motion is filed or other proceedings are initiated to enforce payment of restitution and the court determines that restitution is not being paid or has not been paid as ordered by the court, the court shall promptly take action necessary to compel compliance. MCL 780.766(15); MSA 28.1287(766)(15), and MCL 769.1a(15); MSA 28.1073(15).

*See Form MC 258.

B. Required Procedures When Defendant Is Remanded to Department of Corrections

MCL 780.766(16); MSA 28.1287(766)(16), and MCL 769.1a(16); MSA 28.1073(16), state that if the court determines that a defendant or an individual who is ordered to pay restitution under this section is remanded to the jurisdiction of the Department of Corrections, the court shall provide a copy of the order of restitution to the Department of Corrections when the court determines that the individual is remanded to the department's jurisdiction.

C. Revocation of Probation or Parole for Failure to Comply With Restitution Order

The court may revoke probation and the parole board may revoke parole if the defendant fails to comply with the restitution order and if the defendant has not made a good faith effort to comply with the order. In determining whether to revoke probation or parole, the court or parole board shall consider the defendant's employment status, earning ability, financial resources, the willfulness of the defendant's failure to pay, and any other special circumstances that may have a bearing on the defendant's ability to pay. MCL 780.766(11); MSA 28.1287(766)(11), and MCL 769.1a(11); MSA 28.1073(11).

A defendant shall not be imprisoned, jailed, or incarcerated for a violation of probation or parole, or otherwise, for failure to pay restitution as ordered under this section unless the court or parole board determines that the defendant has the resources to pay the ordered restitution and has not made a good faith effort to do so. MCL 780.766(14); MSA 28.1287(766)(14), and MCL 769.1a(14); MSA 28.1073(14).

20.35 Imposition of Fines

A defendant may be punished by fine and imprisonment, at the court's discretion, even though the statute authorizes a fine *or* imprisonment. MCL 769.5; MSA 28.1077, and *People v Krum*, 374 Mich 356, 360–62 (1965).

The maximum amount of a penal fine is usually found in the penal statute that defines the offense. If the penal statute is silent on the amount of the fine, then the maximum amount of the fine shall be $2000.00 for a felony and $100.00 for a misdemeanor. MCL 750.503 and 750.504; MSA 28.771 and 28.772.

All money collected from penal fines shall be exclusively applied to the establishment and support of public libraries. Const 1963, art 8, § 9.

Excessive fines are prohibited by US Const, Am VIII, and Const 1963, art 1, § 16. See, generally, *People v Antolovich*, 207 Mich App 714, 716–19 (1994).

20.36 Crime Victims Rights Fund Assessment

If the court enters a judgment of conviction following designated proceedings for a felony, serious misdemeanor, or specified misdemeanor, the court shall order the juvenile to pay an assessment. MCL 712A.18(12); MSA 27.3178(598.18)(12). See MCL 780.901(d); MSA 28.1287(901)(d) (definition of felony), MCL 780.901(g); MSA 28.1287(901)(g), and MCL 780.811(a)(i)–(xv); MSA 28.1287(811)(a)(i)–(xv) (definition of serious misdemeanor), and MCL 780.901(h)(i)–(x); MSA 28.1287(901)(h)(i)–(x) (definition of specified misdemeanor).

*See Form JC 72.

MCL 780.905(1); MSA 28.1287(905)(1), states that each person convicted of a felony shall pay an assessment of $60.00, and each person convicted of a serious misdemeanor or a specified misdemeanor shall pay an assessment of $50.00. The court shall order a defendant to pay only one assessment under this subsection per criminal case. Payment of the assessment shall be a condition of a parole order entered under MCL 791.236; MSA 28.2306.*

20.37 Parental Responsibilities for Financial Penalties of Juvenile

No statutory authority exists for imposing financial penalties upon the parent of a juvenile sentenced to prison following designated proceedings. However, if the court delays imposition of sentence, the court may include in its probation order any disposition available under MCL 712A.18; MSA 27.3178(598.18). MCR 5.955(D). Under MCL 712A.18(1)(j)–(k); MSA 27.3178(598.18)(1)(j)–(k), the court may impose fines and costs, and under MCL 712A.18(7); MSA 27.3178(598.18)(7), the court may order the parent or the juvenile to pay restitution to a victim of the juvenile's offense.* See also MCL 769.1(8); MSA 28.1072(8), and MCR 6.905(D) and 6.931(F)(1) (parental responsibility for costs in "automatic" waiver cases).

*See Sections 12.8(J) (fines), 12.8(K) (court costs), and 12.12 (requirements to order restitution).

20.38 Allocation of Payments

Under MCL 775.22; MSA 28.1259, each payment by the defendant must be allocated as follows:

- **F** Fifty percent of all money collected must be applied to victim payments. Victim payments mean payments to the victim or victim's estate, but do not include payments made to an entity that has reimbursed a victim for losses, or assessments paid to the Crime Victim's Rights Fund. MCL 775.22(5); MSA 28.1259(5).
- **F** For violations of state law, the remaining money collected must be applied in the following descending order of priority:
  - — costs;
  - — fines;
  - — probation or parole supervision fees;
  - — assessments and other payments.

MCL 775.22(3); MSA 28.1259(3).

If any victim payments remain unpaid after all of the other fees have been paid, then all of the remaining money collected shall be applied to victim payments. Also, if all of the victim payments have been made, then all of the remaining money collected shall be applied to the other fees in the order of priority listed in Subsection (3). MCL 775.22(2); MSA 28.1259(2).

Part VI — Post-Sentencing Proceedings

20.39 Required Disclosure of Presentence Report After Sentencing Hearing

*See 20.14, above (required disclosure of presentence report before sentencing).

MCR 6.425(C) provides that after sentencing, the court, on written request, must provide the prosecutor, the defendant's lawyer, or the defendant not represented by a lawyer, with a copy of the presentence report and any attachments to it. The court must exempt from disclosure any information the sentencing court exempted from disclosure pursuant to MCR 6.425(B).*

20.40 Required Advice Concerning the Juvenile's Right to Appeal and Appointment of Appellate Counsel

NOTE: The appellate rights of juveniles in designated cases mirror those of adults. See MCR 5.955(C), which provides that MCR 6.425 applies to designated proceedings. MCR 5.993 applies only to delinquency and child protective proceedings. MCR 5.901(B)(1).

A. Where Conviction Followed Trial

MCR 6.425(E)(1)(a)–(c) states that in a case involving a conviction after a trial, immediately after imposing sentence, the court must advise the defendant, on the record, that:

*See Section 25.4.

(a) the defendant is entitled to appellate review of the conviction and sentence;*

(b) if the defendant is financially unable to retain a lawyer, the court will appoint a lawyer to represent the defendant on appeal; and

*See Form CC 265.

(c) the request for a lawyer must be made within 42 days after sentencing.*

B. Where Conviction Followed Plea of Guilty or Nolo Contendere

In a case involving a conviction following a plea of guilty or nolo contendere, immediately after imposing sentence, the court must advise the defendant, on the record, that:

*See Section 25.4.

(a) the defendant is entitled to file an application for leave to appeal;*

(b) if the defendant is financially unable to retain a lawyer, the defendant may request appointment of a lawyer to represent the defendant on appeal; and

(c) the request for a lawyer must be made within 42 days after sentencing.

MCR 6.425(E)(2)(a)–(c).*

*See Form CC 265.

C. Required Request for Counsel Form

In either case, the court must also give the defendant a request for counsel form containing an instruction informing the defendant that the form must be completed and returned to the court within 42 days after sentencing if the defendant wants the court to appoint a lawyer. MCR 6.425(E)(3).

20.41 Required Rulings on Juvenile's Request for Appointment of Appellate Counsel

If there is no postjudgment motion pending, the court must rule on a defendant's request for a lawyer within 14 days after receiving the request. MCR 6.425(F)(1)(a). If there is a postjudgment motion pending, the court must rule on the request within 14 days after the court's disposition of the pending motion. *Id.**

*See Sections 17.16 (challenging pleas after sentencing) 18.19 (motions for new trial), and 20.46, below (time requirements for motions for resentencing).

Indigent defendants are entitled to appointed counsel in their first appeal as of right. *Douglas v California*, 372 US 353; 83 S Ct 814; 9 L Ed 2d 811 (1963). The right exists for misdemeanors as well as felonies. Const 1963, art 1, § 20, and *People v Mallory*, 378 Mich 538, 555–56 (1967).

A. Cases in Which the Juvenile Was Convicted Following Trial

In a case involving conviction following trial, if the defendant is indigent, the court must enter an order appointing a lawyer if the request is filed within 42 days after sentencing or within the time for filing an appeal of right. The court should liberally grant an untimely request as long as the defendant may file an application for leave to appeal. MCR 6.425(F)(1)(b).*

*See Forms CC 402 and 403.

B. Cases in Which the Juvenile Was Convicted Following Plea of Guilty or Nolo Contendere

In a case involving a conviction following a plea of guilty or nolo contendere, the court should liberally grant the request if it is filed within 42 days after sentencing. MCR 6.425(F)(1)(c).*

*See Forms CC 402 and 403.

C. Case Law Construing the Requirement That the Trial Court "Liberally Grant" Untimely Requests for Appellate Counsel

In 1994, Michigan voters approved Proposal B to amend Const 1963, art 1, § 20, to provide that an appeal by a defendant who pleads guilty or nolo contendere shall be by leave of the Court of Appeals rather than by right. Proposal B was then implemented by the legislature. See MCL 770.3(e); MSA 28.1100(e). However, the implementing legislation is silent as to the defendant's right to the appointment of counsel, if indigent, to appeal by leave in such cases.

On December 30, 1994, the Supreme Court amended MCR 6.301, 6.302, 6.311, 6.425, 7.203, 7.204, and 7.205 in light of the changes made by the voters and legislature. 447 Mich cl (1994). The Supreme Court's "interim amendments" to the court rules have been extended four times "in anticipation of legislation regarding the appointment of appellate counsel in guilty plea cases." 455 Mich xxvi (1997). Because no such legislation has been enacted, the interim amendments will remain in effect until further order of the Court. *Id.* MCR 6.425(F)(1)(b) (appeals by right) and MCR 6.425(F)(1)(c) (appeals by leave) both state that the court should "liberally grant" an untimely request if made within the time for filing an application for leave to appeal.

Prior to the passage of Proposal B, in *People v Cottrell*, 201 Mich App 256 (1993), the Court of Appeals construed the "liberally grant" language of MCR 6.425(F) to mean that a court should appoint counsel for the defendant in criminal cases where the defendant untimely requests counsel within 18 months of sentencing, and that appointment of counsel should not be denied solely on the basis of an untimely request. The 18-month period in *Cottrell* was based upon MCR 7.205(F)(3), which allowed an application for leave to appeal to be filed within 18 months. MCR 7.205(F)(3) has since been amended and now requires the application for leave to appeal to be filed within 12 months of sentencing unless one of the exceptions in MCR 7.205(F)(4) applies.

In *People v Najar*, ___ Mich App ___ (1998), the Court of Appeals again construed the "liberally grant" language of MCR 6.425(F), this time in light of Proposal B. After noting that there is no federal or state constitutional right to appointed counsel for filing an application for leave to appeal, the Court found a useful analogy in the "great liberality" standard established by courts for considering requests to withdraw guilty pleas before sentencing. The Court in *Najar, supra,* at ___, provided the following test:

> "We therefore hold that if an indigent defendant's request for counsel raises any issue other than one relating to (1) the facial regularity of the plea-taking procedure, (2) the trial court's adherence to a sentencing agreement, (3) a plain correction of clerical error in court documents, such as a misspelling or a mathematical miscalculation or (4) other instances absolutely devoid of merit,[2] the

request for appointment of appellate counsel should be granted.

"We further hold that if in a request for appointed appellate counsel an indigent defendant raises a properly preserved issue alleging only that the advice of rights given by the trial court did not comply with MCR 6.302(B) or an allegation that he was not sentenced in accordance with an agreement and thus is entitled to withdraw his plea,[*] *People v Cobbs,* 443 Mich 276; 505 NW2d 208 (1993), the trial court can easily examine the record to determine the accuracy of the claims. If upon examination of the record the trial court finds that the claims are not accurate, it can exercise its discretion to deny the request for appointed appellate counsel. A request in such a case may be granted if the trial court determines that the indigent defendant is in need of assistance to pursue an application for leave to appeal."

*See Sections 17.4 (court rule requirements for pleas) and 17.7 (plea procedures when there is a sentence agreement).

"[2]For example, an indigent defendant who has never before been arrested, tried or convicted in connection with the charge or transaction underlying a plea-based conviction would plainly have no claim that such a conviction violated double jeopardy protections."

20.42 Order Appointing Counsel as Claim of Appeal in Cases Where Conviction Followed Trial

In a case involving a conviction following a trial, if the defendant's request for a lawyer, timely or not, was made within the time for filing a claim of appeal, the order appointing counsel (or, if counsel is retained, the order to prepare transcripts) must be entered on a form approved by the State Court Administrator's Office, entitled "Claim of Appeal and Appointment of Counsel,"* and the court must immediately send to the Court of Appeals a copy of the order and a copy of the judgment being appealed. The court also must file in the Court of Appeals proof of having made service of the order as required in MCR 6.425(F)(2). MCR 6.425(F)(3).

*See Form CC 403.

NOTE: Because the claim of appeal and order for appointment of appellate counsel are entered on the same form, a timely claim of appeal, for all practical purposes, renders moot the timeliness of a request for appellate counsel. The defendant maintains an appeal by right if the claim of appeal is timely filed.

Entry of the order appointing appellate counsel by the trial court pursuant to this subrule constitutes a timely filed claim of appeal for purposes of MCR 7.204. MCR 6.425(F)(3).

20.43 Required Order to Prepare Transcripts

The order appointing counsel must:

- **F** direct the court reporter to prepare and file the necessary transcripts within the time limits specified in MCR 7.210, and
- **F** provide for the payment of the reporter's fees.

MCR 6.425(F)(2)(a)–(b).

The court must promptly serve a copy of the order on the prosecutor, the defendant, the appointed lawyer, the court reporter, and the Michigan Appellate Assigned Counsel System. MCR 6.425(F)(2).

A. Duties of Court Reporter or Recorder

*See Form MC 501.

Within 7 days after a transcript is ordered by a party or the court, the court reporter or recorder shall furnish a certificate* stating that the transcript has been ordered and payment for it made and secured and that it will be filed as soon as possible or has already been filed. MCR 7.210(B)(3)(a). The time limits for the filing of transcripts are contained in MCR 7.210(B)(3)(b).

B. Indigent's Right to Transcripts on Appeal

The state must furnish a "record of sufficient completeness" for adequate consideration of the defendant's claims of error. *People v Bass (On Rehearing),* 223 Mich App 241, 257 (1997), app dis ___ Mich ___ (1998), quoting *Draper v United States,* 372 US 487, 497; 83 S Ct 774; 9 L Ed 2d 899 (1963). A full transcript is not automatically required; however, once an indigent defendant establishes "a colorable need for a complete transcript," the state has the burden to show that less than a full transcript will suffice. *Mayer v Chicago,* 404 US 189, 195; 92 S Ct 410; 30 L Ed 2d 372 (1971).

When defendant's parents retained counsel on appeal after the court had found defendant indigent and appointed counsel, defendant was entitled to preparation of transcripts at public expense where there was no change in his own financial condition. *People v Arquette,* 202 Mich App 227, 228–31 (1993).

C. Ordering the Transcript of Jury Voir Dire

The court must now order the transcript of the jury voir dire. MCR 6.433(D), which previously allowed the court to order the transcript of

the jury voir dire only where the defendant challenged the jury array, exhausted all peremptory challenges, was sentenced to a term of life imprisonment without the possibility of parole, or showed good cause, was deleted effective May 6, 1998. AO 89-35. See *People v Bass (On Rehearing)*, 223 Mich App 241 (1997), app dis ___ Mich ___ (1998).

D. Indigent Defendant's Request for Additional Documents or Transcripts

If an indigent defendant has an appeal of right, he or she may file a written request with the sentencing court for specified court documents or transcripts that are required to pursue that appeal of right. The court must then order the clerk to provide the defendant with copies of documents without cost to the defendant, and, unless the transcript has already been ordered as provided in MCR 6.425(F)(2), must order the preparation of the transcript. MCR 6.433(A).

In appeals by leave, an indigent defendant may obtain copies of transcripts and other documents by showing that they are required to prepare the application for leave to appeal. MCR 6.433(B).

If an indigent defendant is not eligible to file an appeal by right or an application for leave to appeal, he or she may still obtain the records and documents necessary to pursue other postconviction remedies in a state or federal court. If the requested documents or transcripts have already been filed with the court, the clerk must provide the defendant with copies of such materials without cost to the defendant. If they have not been filed with the court, the court may order that they be provided if there is good cause for doing so. MCR 6.433(C).

20.44 Requirements for the Judgment of Sentence*

*See Section 18.18(C) for possible verdicts in designated cases.

*See Forms JC 71 and 72.

Within seven days after sentencing, the court must date and sign a written judgment of sentence* that includes:

(1) the title and file number of the case;

(2) the defendant's name;

(3) the crime for which the defendant was convicted;

(4) the defendant's plea;

(5) the name of the defendant's attorney if one appeared;

(6) the jury's verdict or the finding of guilt by the court;

(7) the term of the sentence;

(8) the place of detention;

(9) the conditions incident to the sentence; and

(10) whether the conviction is reportable to the Secretary of State pursuant to MCL 257.732; MSA 9.2432 and, if so, the defendant's Michigan driver's license number.

MCR 6.427(1)–(10).

If the defendant was found not guilty or for any other reason is entitled to be discharged, the court must enter judgment accordingly. The date a judgment is signed is its entry date. MCR 6.427.

Upon conviction in a designated case, the juvenile may be required to:

*See Section 4.10(A).

- **F** submit to fingerprinting.*

*See Section 4.11(C).

- **F** register as a sex offender;*

*See Section 4.12(A).

- **F** provide samples for DNA identification; and*

*See Section 4.13(B).

- **F** submit to testing for venereal disease or AIDS.*

The court clerk must also send a copy of the judgment of sentence to the Michigan State Police Central Records Division to create a criminal history record. MCL 769.16a; MSA 28.1086(1).

20.45 Corrections and Modifications of Sentences After Imposition

The sentencing court may correct an invalid sentence, but the sentencing court may not modify a valid sentence after it has been imposed except as provided by law. MCR 6.429(A).

*See Section 20.46, below, for a discussion of the time requirements for motions for resentencing.

A motion for resentencing* is not a condition precedent for the sentencing court to correct an invalid sentence under MCR 6.429(A), nor are there any time requirements set by the court rule. *People v Harris,* 224 Mich App 597, 601 (1997).

A. Sentencing Court's Ability to Correct an Invalid Sentence After Imposition

The trial court's authority to correct a sentence after imposition of that sentence, thereby resentencing the defendant, depends on whether the previously imposed sentence is valid. The trial court does not have the power to resentence a defendant after imposition of a valid sentence because that would infringe upon the exclusive power of the governor to commute sentences. *In re Jenkins,* 438 Mich 364, 368 (1991). The following are some examples of invalid sentences that may be modified by the trial court:

- **F** the sentence is beyond statutory limits;* *See Section 20.25.
- **F** the sentencing court relies on constitutionally impermissible considerations, such as constitutionally infirm prior convictions, or improper assumption of a defendant's guilt of a charge which has not yet come to trial;* *See Sections 20.22 and 20.23.
- **F** the court fails to exercise its discretion because it is laboring under a misconception of the law;
- **F** the court conforms the sentence to a local sentencing policy rather than imposing an individualized sentence;* *See Section 20.24.
- **F** the court fails to utilize a reasonably updated presentence report; or
- **F** the court fails to provide the defendant and his lawyer with the opportunity to address the court before the sentence is imposed.* *See Section 20.18.

Id., at 369, n 3, quoting *People v Whalen,* 412 Mich 166, 169–70 (1981). See also *People v Harris,* 224 Mich App 597, 600 (1997) (a sentence based on inaccurate information is invalid).* But see *People v Wybrecht,* 222 Mich App 160, 168–70 (1997) (the trial court *does not* have the authority to determine that its previously imposed sentence violates the principle of proportionality).

*See Section 20.21, above, for a discussion of required procedures for resolving challenges to presentence report.

If the error is based on a mistake of law regarding the necessity of consecutive sentences, then the sentencing judge must correct the invalid sentence after it is brought to his or her attention. However, this correction may not be done sua sponte without providing any notice to defendant. Instead, the trial court should conduct another sentencing hearing because the sentencing judge might have imposed different sentences if he or she had known that consecutive sentences were required. *People v Thomas,* 223 Mich App 9 (1997). But see *People v Miles,* 454 Mich 90, 101 (1997) (sentencing court's amendment of the judgment of sentence for felony firearm conviction was harmless error since consecutive sentencing was required, but defendant was entitled to resentencing hearing on underlying armed robbery conviction).

B. Sentencing Court's Ability to Modify a Valid Sentence After Imposition

A trial court may modify a valid sentence after it is imposed only if the modification is authorized by law. Two common examples of such authorizations are as follows:

- Trial courts may reduce sentences of jail inmates by one-quarter for good conduct. MCL 801.257; MSA 28.1747(7). See, generally, *People v Groff*, 204 Mich App 727 (1994).
- Trial courts may modify a jail term imposed as a condition of probation. MCL 771.2; MSA 28.1132.

If the sentence is changed in any respect by the sentencing judge, the court clerk must give written notice of the change to the prosecuting attorney. If the prosecuting attorney opposes the change, he must file an application, within 5 days after receiving such notice, and is then entitled to be heard in open court on the merits of the change. MCL 769.27; MSA 28.1097.

20.46 Time Periods for Filing Motions for Resentencing

A motion for resentencing may be filed with the trial court within 42 days after entry of the judgment. MCR 6.429(B)(1).*

*See Section 20.44 for a discussion of the requirements for judgments of sentence.

If a claim of appeal has been filed, a motion for resentencing may only be filed in accordance with the procedure set forth in MCR 7.208(B) or the remand procedure set forth in MCR 7.211(C)(1). MCR 6.429(B)(2).

If the defendant fails to file a timely claim of appeal, the defendant may file a motion for resentencing within the time for filing an application for leave to appeal. MCR 6.429(B)(3). MCR 7.205(F)(3) requires the application for leave to appeal to be filed within 12 months of sentencing unless one of the exceptions in MCR 7.205(F)(4) applies.

If the defendant is no longer entitled to appeal by right or by leave, the defendant may seek relief pursuant to the procedure set forth in Subchapter 6.500. MCR 6.429(B)(4).

20.47 Requirements for Challenging Accuracy of Presentence Reports or Scoring of Sentencing Guidelines

A party may not raise on appeal an issue challenging the accuracy of the presentence report or the scoring of the sentencing guidelines unless the party has raised the issue at or before sentencing or demonstrates that the challenge was brought as soon as the inaccuracy could reasonably have been discovered. Any other challenge may be brought only by motion for relief from judgment under Subchapter 6.500. MCR 6.429(C).

Appellate review of the scoring of sentencing guidelines is limited to whether "(1) a factual predicate is wholly unsupported, (2) a factual predicate is materially false, and (3) the sentence is disproportionate." *People v Raby*, 456 Mich 487, 497–98 (1998), quoting *People v Mitchell*, 454 Mich 145, 177 (1997). As a result, the Court of Appeals will now review the scoring of sentencing guidelines only if defendant's challenge is directed to the accuracy of the factual basis for his or her sentence, and will not review the judge's scoring of a guideline variable that is based on the judge's interpretation of unchallenged facts. *Id.*